SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2022 0194

DIRECTOR OF PUBLIC PROSECUTIONS Appellant

v

BRIAN JAMES WILSON Respondent

JUDGES:	NIALL, BOYCE and T FORREST JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	15 February 2024
DATE OF JUDGMENT:	27 March 2024
MEDIUM NEUTRAL CITATION:	[2024] VSCA 48
JUDGMENT APPEALED FROM:	[2022] VCC 1995 (Judge Wraight)

CRIMINAL LAW – Appeal – Sentence – Crown Appeal – Obtaining financial advantage by deception – Obtaining property by deception – Respondent befriended elderly victim and invited him to split profits in fictitious business dealings – Victim advanced approximately two million dollars to respondent who did not invest monies as agreed and instead gambled it away – Respondent pleaded guilty to nine charges of obtaining financial advantage by deception and two charges of obtaining property by deception – Sentenced to 5 years' imprisonment with a non-parole period of 3 years – Whether aggregate sentence imposed on all charges and non-parole period, manifestly inadequate – Sentence and non-parole period manifestly inadequate – Appeal allowed – Resentenced to 8 years' imprisonment with a non-parole period of 5 years and 8 months.

Crimes Act 1958, ss 81, 82; *Sentencing Act 1991*, s 5(2F).

Mason (a pseudonym) v The King [2023] VSCA 75, *Foster (a pseudonym) v The King* [2023] VSCA 94, *Clarkson v The Queen* (2011) 32 VR 361, applied; *Crawford (a pseudonym) v The Queen* [2018] VSCA 113, discussed.

Counsel

Appellant:	Mr B Kissane KC and Mr T Bourbon
Respondent:	Mr P Smallwood

Solicitors

Appellant:	Ms A Hogan, Solicitor for Public Prosecutions
Respondent:	Emma Turnbull Lawyers

NIALL JA
BOYCE JA
T FORREST JA:

1 On 22 November 2022, after pleas of guilty, the respondent was sentenced in the County Court on nine charges of obtaining financial advantage by deception ('OFAD') and two charges of obtaining property by deception ('OPD'). Nine of the OFAD charges were rolled-up charges, each involving many individual transactions.

2 The table below sets out the details of this sentencing exercise.

Charge on Indictment	**Offence**	**Max Penalty**	**Sentence**
1	OFAD[1] (rolled-up charge)	10 years' imprisonment	5 years' imprisonment (aggregate sentence for charges 1–11)
2	OFAD (rolled-up charge)	10 years' imprisonment	
3	OFAD (rolled-up charge)	10 years' imprisonment	
4	OFAD (rolled-up charge)	10 years' imprisonment	
5	OPD[2]	10 years' imprisonment	
6	OPD (rolled-up charge)	10 years' imprisonment	
7	OFAD (rolled-up charge)	10 years' imprisonment	
8	OFAD (rolled-up charge)	10 years' imprisonment	
9	OFAD (rolled-up charge)	10 years' imprisonment	
10	OFAD (rolled-up charge)	10 years' imprisonment	
11	OFAD	10 years' imprisonment	
Total Effective Sentence:		5 years' imprisonment	
Non-Parole Period:		3 years	

1 Contrary to s 82(1) of the *Crimes Act 1958*.
2 Contrary to s 81(1) of the *Crimes Act 1958*.

Pre-sentence Detention Declared:	11 days
Section 6AAA Statement:	8 years' imprisonment with a non-parole period of 5 years
Other Relevant Orders: 1. Pursuant to s 86 *Sentencing Act 1991*, compensation order in the amount of $1,592,150.00.	

3 The appeal is brought under s 287 of the *Criminal Procedure Act 2009*. The Director of Public Prosecutions considers that there is an error in the sentence imposed, that a different sentence should be imposed and is satisfied that an appeal should be brought in the public interest. The sole ground of appeal is:

> The aggregate sentence imposed on charges 1 to 11 (inclusive), and the non-parole period, are manifestly inadequate.

4 We have concluded that the appeal should be allowed and the respondent must be resentenced. What follows are our reasons for this conclusion.

Background

5 The respondent developed a friendship with an elderly and vulnerable man. That man, Mark Foster, was 82 years old at the time of the offending against him, and the respondent between 51 and 52 years old.

6 In August 2018, Mr Foster decided to sell the family home and move to a retirement village having noticed that his faculties were declining as he was getting older and he was, in his words, 'not as sharp as he used to be'. Mr Foster was first introduced to the respondent in about 2015 or 2016 through a mutual friend. He did not know the respondent well. In about August 2018, after Mr Foster had placed the family home on the market, the respondent began to attend Mr Foster's home and develop a friendship with him. Mr Foster found the respondent to be friendly and helpful.

7 The family home, encumbrance free, was sold for $1.6 million. The respondent became friendlier and more helpful. He assisted Mr Foster to dispose of 30 years' worth of detritus from the old home and to move some family belongings to the retirement home. During their conversations at that time, Mr Foster discussed his financial situation with the respondent, including telling him that his home was mortgage-free. Soon after Mr Foster moved into the retirement home, the respondent, who had begun visiting him there, told Mr Foster he worked from home and carried out various profitable business dealings. By that time, Mr Foster considered him to be a good friend. In time, the respondent offered to include Mr Foster in these profitable business dealings and in return the two men would split the profits. After some time, the respondent stopped visiting him but continued to discuss the business proposals by text message.

8 Between October 2018 and September 2019, Mr Foster advanced to the respondent nearly $2 million. None of those monies were invested in business dealings. Over roughly the same period, the respondent placed over $20 million worth of bets with Tabcorp, Sportsbet, Beteasy and Ladbrokes. He admitted that the funds received from Mr Foster had been moved through three of his betting accounts. In all, after deducting monies returned, Mr Foster's net

loss was in the range of $1.6 million.

9 The baldest details of the fraudulent activities are set out below.

(a) Charge 1

(b) The respondent falsely claimed to have a cleaning contract with Brimbank Council and could sell at a profit various products related to it. He generated a false contract and showed it to Mr Foster to support his dishonest claims. Mr Foster advanced to the respondent $324,100 over the course of 6 months (between October 2018 and April 2019) in 32 separate transactions to participate in his fictitious cleaning business.

(c) Charge 2

(d) The respondent falsely claimed to be able to sell at a profit a chemical used to 'clean milk'. Over five weeks commencing in mid December 2018, in 13 separate transactions, the respondent dishonestly obtained $273,900 from Mr Foster.

(e) Charge 3

(f) The respondent falsely claimed to have a cleaning contract in Geelong and could sell at a profit various products related to it. Over the course of 5 months commencing February 2019, the respondent dishonestly obtained $55,100 from Mr Foster in eight separate transactions.

(g) Charge 4

(h) The respondent falsely claimed to have a cleaning contract in Ballarat and could sell at a profit various products related to it. Over the course of seven months commencing November 2018, the respondent dishonestly obtained $215,000 from Mr Foster in 21 separate transactions.

(i) Charges 5 and 6

(j) The respondent falsely claimed to be able to generate a profit from the purchase of and re-sale of a Techni Jet waterjet cutting machine (Charge 5) and the purchase of Techni Jet equipment including a water cutting machine and a special type of sand known as garnet sand for use with the machine (Charge 6). He obtained $37,000 from Mr Foster with one cheque (Charge 5), and $210,000 from him with another two cheques (Charge 6). These transactions took place in late February and March 2019.

(k) Charges 7 and 8

(l) The respondent falsely claimed to be able to generate a profit from the purchase and re-sale of parts for Techni Jet water cutting machines and, in addition with respect to Charge 7, garnet sand. He obtained $150,000 from Mr Foster in 11 separate transactions (Charge 7), and a further $414,000 over four separate transactions (Charge 8). These transactions took place in March to April 2019.

(m) Charge 9

(n) The respondent falsely claimed to have a cleaning contract with Metricon Homes. Over 17 separate transactions, the respondent dishonestly obtained $215,600 from Mr Foster between May and September 2019.

(o) Charge 10

(p) The respondent falsely claimed to have a cleaning contract with a TAFE and could sell at a profit various products related to it. He dishonestly obtained $20,200 from Mr Foster in two transactions between March and May 2019.

(q) Charge 11

(r) On 6 September 2019, the respondent sent Mr Foster a text message asking for $18,000. He falsely told Mr Foster that the money would be used to pay out the finance on his car so that he could sell it at a profit which he would split with Mr Foster. Further, he said that the $18,000 would be repaid with an additional amount of $4,000 a few days later. When Mr Foster had the temerity to ask that he be repaid, the respondent became aggressive to Mr Foster calling him a 'fucking arsehole' and a 'piece of shit'. The respondent also told Mr Foster that he could go into the bankruptcy list 'just like everybody else'.

10 In total, over the course of 11 months, the respondent made 112 requests for money from Mr Foster, all under various dishonest pretexts and obtained a total of $1,929,000 from him. This is on average a request approximately every three days.

Objective gravity

11 On the issue of the nature and gravity of the offending, the judge said:

> It is undeniable that your offending is very serious. You took advantage of a trust you had developed and nurtured with an elderly and vulnerable man. Over approximately a one year period, you took $1.929 million from him. While in the course of the offending you returned some money to Mr Foster in the order of some $300,000, you continued to request further funds and it is not in dispute that all of the money you obtained from the victim was gambled by you. Your dishonest conduct was calculated and sustained and can only be described as reprehensible.
>
> [The prosecutor] … highlighted a number of matters which he submits should be taken into account when considering the gravity of your offending as follows:
>
> - the frequency and duration of the offending (for example, that it involved some 112 requests for funds over the offending period for purported business opportunities);
> - the significant degree of planning and sophisticated nature of the offending;
> - the value of the financial advantage obtained;
> - the steps taken to conceal the offending;

- the significant breach of trust; and
- the vulnerability of the victim and the impact of the offending on him.

These points are expanded on in the written submissions and I accept that they are relevant matters which I have taken into account. [Defence counsel] … did not take issue with the characterisation of the offending as outlined by [the prosecutor], accepting the very serious nature of your conduct.

The victim, Mark Foster, was 82 years old when you committed the crimes against him, and he is now 86. In his eloquent victim impact statement Mr Foster states:

> *All of this money has now gone, and this has left me totally devastated. Since the loss of this money, I constantly worry about how I can survive financially. I am 86 years old and I worked hard all my life. I saved and planned very hard for my retirement, and I now find myself worried about the ability to provide for myself for the rest of my life.*

Mr Foster goes on to say that his mental health has also suffered significantly. He has suicidal thoughts and on one occasion has attempted suicide. He fears that the impact of your crimes will affect him for the remainder of his life.

The victim impact statement clearly demonstrates the serious impact of your cruel, self-centred conduct. You befriended an elderly man who in his own words says that he was 'not as sharp as he used to be' and you completely took advantage of him.

In my view your offending represents a high end example of this type of deceptive conduct against a vulnerable individual and thus, in all the circumstances your moral culpability is also very high.[3]

12 We consider these remarks to be unimpeachable.

13 The judge considered general deterrence and specific deterrence to be 'prominent sentencing considerations'.[4] Again, these conclusions are entirely correct.

Personal Circumstances

14 The respondent was born in 1966 and was, at the time of sentence in 2022, aged 55 years. He described himself as coming from a 'very normal and loving family'[5] and was able to complete both primary and secondary school education without any significant setbacks.

15 He disclosed experiencing sexual abuse from a former partner of his grandmother but is unsure whether that has any ongoing effects — he 'just [doesn't] think about it'.[6]

3 *DPP v Wilson* [2022] VCC 1995, [54]–[60] (Judge Wraight) ('Reasons') (emphasis in original).
4 Reasons, [79]–[80].
5 Reasons, [62].
6 Reasons, [64].

16 He worked mostly in sales in his professional life, before undertaking to be a self-employed handyman for the last several years.

17 He married at 19 years of age, although that relationship broke down in his mid-thirties and ultimately ended when he was arrested and imprisoned for earlier dishonesty offending. He is currently in a relationship with a woman who has two children of her own, and he plays a parental role in the children's lives.

18 The respondent has experienced bouts of anxiety and depression since being charged with the offences the subject of this appeal, most acutely in an episode of suicidal ideation when he drove his car into a tree trying to end his life. He later admitted himself as a psychiatric inpatient for about a week. He was discharged without any follow up mental health support but was provided with referrals for gambling related counselling services, which he consulted and found helpful. When assessed prior to the plea, the respondent was presented with symptoms of mild depression and anxiety, however the symptoms were not severe enough to meet the criteria for any active mental disorder.

19 The respondent's problem gambling history is extensive (including regarding his prior offences set out below at para [21] of these reasons). It was a normalised pastime in his family growing up. He was assessed as meeting the DSM-5 diagnostic criteria for a 'gambling disorder', but the assessor could not find any indication that he laboured under any mental disorder when the offending occurred.

20 Despite his mental health and gambling issues, he is not currently receiving any mental health treatment. He has previously experienced depressive mood and sought counselling from time to time as an adult to address issues related to stress however has never committed to long-term treatment due to not finding counselling helpful and generally possessing considerable scepticism about the benefits of mental health care. When assessed prior to the plea, the respondent did not believe that it was necessary for him to receive any gambling related treatment.

Prior Criminal History

21 The respondent has a highly relevant criminal history commencing in 2003. Between 2003 and 2008, he was sentenced for numerous offences all involving dishonest conduct including:

- Defrauding the Commonwealth;
- Forging a document issuable by the Commonwealth;
- Obtaining property by deception (numerous examples);
- Obtaining financial advantage by deception (numerous examples);
- Making a false document (numerous examples).

22 After some initial leniency, from 2006 onwards the respondent was on several occasions sentenced to terms of imprisonment for deception related offending.[7] In August 2007, he was sentenced to 3 years' imprisonment with a non-parole period of 18 months for deception related offending in relation to some $76,000.[8] The current spate of offending is a significant escalation in criminality.

7 This offending resulted in two sentences of imprisonment in 2006. One was served wholly by way of an Intensive Correction Order ('ICO'). The other was suspended initially and then breached in 2007, resulting in another term of imprisonment to be served by way of an ICO.

23 The judge considered that the respondent's prospects for rehabilitation were 'unable to be assessed positively',[9] and that his criminal history was 'relevant' and, as with the offending the subject of the appeal, 'stemmed from attempts to support [his] gambling habits'.[10]

24 Again, we agree with these remarks.

Consideration

Factors of aggravation

25 The following factors of aggravation are present in this case:

- The criminal misconduct involved an egregious breach of trust.
- The sole victim was elderly and highly vulnerable. He has been financially and emotionally devastated by the offending.
- The offending conduct was persistent, intense and predatory.
- The amount of money stolen was very significant.
- Charges 1 to 4 and 6 to 10 were rolled-up charges requiring sentences that reflected the totality of the offending captured in those charges.[11]
- The offending was pre-planned and quite sophisticated at times. False documents were generated and repayments of some monies were made under the guise of profits from investments.

8 See *R v Wilson* [2007] VCC 1016. The figure of $76,000 cited by his Honour in the Reasons related to the value of property obtained. Another $62,500 was the subject of a series of dishonoured cheques and a further approximately $70,000 related to attempts to obtain a loan application (subsequently cancelled by the bank) and other property (laptops). The respondent subsequently sought leave to appeal against sentence, which was refused: *R v Wilson* (Supreme Court of Victoria, Court of Appeal, Vincent JA, 10 April 2008).

9 Reasons, [82].

10 Reasons, [73]–[74].

11 The respondent did not fall to be sentenced as a 'continuing criminal enterprise' offender despite Charges 6 and 8 being 'continuing criminal enterprise' offences. See Reasons, [21]–[23]; ss 5(2F) and 6H(1) of the *Sentencing Act 1991*; and *Crawford (a pseudonym) v The Queen* [2018] VSCA 113, [63]–[67].

Factors in mitigation

26 The following factors of mitigation are present in this case:

- The respondent's pleas of guilty, made on the morning of the trial, were of utilitarian value in that it belatedly dispensed with the need for a reasonably lengthy criminal trial. We note however that Mr Foster's account was challenged in pre-recorded evidence and he was cross-examined over three days to the effect that he was an informed partner in failed business opportunities rather than a victim of a crime. The respondent's plea of guilty carried some moderate additional utilitarian weight given that the plea was entered in circumstances where the COVID-19 pandemic had created a substantial backlog of cases in the criminal justice system.[12] The lateness of the plea however diminished the weight to be given to this aspect.
- No submissions on delay were made during the plea hearing but the judge took into account the relatively lengthy procedural history and noted that some of the adjournments were as a result of the respondent missing filing deadlines. The judge accepted 'that this matter has been hanging over [the respondent's] head for some time resulting in further anxiety'.[13] We accept that this is a relevant mitigating consideration.
- On the plea, counsel had sought to emphasise the respondent's issues with gambling as an explanation for his offending but did not seek to rely on any *Verdins*' principles.[14] The judge noted that while in a narrow range of circumstances gambling may be a mitigating factor, in this instance, in all the circumstances, it was of limited weight. The judge said:

> Given the serious nature of your calculated offending and the gross breach of trust in this instance, in my view your gambling addiction is subsumed by the need to give sufficient weight to the other prominent sentencing considerations of deterrence, both general and specific, and denunciation of your conduct.[15]

- In the time between being charged and the plea, the respondent had not reoffended.[16]
- The custodial environment at the time of sentence was still labouring under the impact of the COVID-19 pandemic. The judge noted that 'while the conditions have begun to improve, many services remain limited and prisoners are subject to periods of lockdown and quarantine'.[17]

27 On this appeal, the director essentially submitted that the aggregate sentence imposed simply

12 Reasons, [76]–[77].

13 Reasons, [78].

14 As to the respondent's issues with gambling, see Reasons, [68,] [72]–[73], [80]–[82]. The forensic psychologist, Mr Patrick Newton, assessed the respondent's gambling behaviour as being sufficiently severe to meet the DSM-5 diagnostic criteria for a 'gambling disorder' however he noted that there was no indication to suggest that the respondent was labouring under the effects of any mental disorder at the time of the offending.

15 Reasons, [81].

16 Ibid.

17 Reasons, [83].

did not reflect the circumstances of the offending, nor were the judge's stern sentencing remarks and findings reflected in that sentence.

28 The respondent recited all the judge's findings on sentence and urged the Court that the judge had overlooked nothing, was well placed to evaluate the various relevant sentencing factors and imposed a sentence that was within the range of sentences reasonably available.

Conclusion

29 In truth, there was little that could be said on the respondent's behalf beyond delay and his belated plea of guilty, and a great deal that could be said against him. His criminal conduct was egregious. He cultivated the friendship of an elderly and vulnerable man and then breached that trust on more than a hundred occasions over the course of 11 months. As we have observed, the amount of stolen money was very significant and all of it, it seems, went to feed a gambling addiction. The gambling addiction may explain the offending but does little to excuse it. All of this is against the background of a substantial prior criminal history of dishonesty.

30 Manifest inadequacy is a ground that is difficult to establish[18] however we are entirely satisfied that the sentence imposed is below the range available to his Honour, having regard to inter alia:

- the objective gravity of the offending;
- the respondent's very high moral culpability over a substantial offending period involving gross breaches of trust;
- the need for specific deterrence;
- the need for general deterrence;
- the need for denunciation;
- the very guarded prospects for rehabilitation;
- the delay and associated anxiety;
- the absence of remorse;
- the belated plea of guilty; and
- all charges, save for Charges 5 and 11, are course of conduct charges.[19]

Resentence

31 Whilst the judge was not in error in imposing an aggregate sentence, in this resentencing exercise, in the interests of transparency, we shall impose individual sentences with some orders for cumulation.

(a) On Charge 1, the respondent is sentenced to 4 years' imprisonment.

[18] *Mason (a pseudonym) v The King* [2023] VSCA 75, [50] (Beach and Niall JJA); *Foster (a pseudonym) v The King* [2023] VSCA 94, [19] (Emerton P and T Forrest JA); *Clarkson v The Queen* (2011) 32 VR 361, 384 [89] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA); [2011] VSCA 157.

[19] *Sentencing Act 1991*, s 5(2F).

(b) On Charge 2, the respondent is sentenced to 4 years' imprisonment.

(c) On Charge 3, the respondent is sentenced to 18 months' imprisonment.

(d) On Charge 4, the respondent is sentenced to 4 years' imprisonment.

(e) On Charge 5, the respondent is sentenced to 12 months' imprisonment.

(f) On Charge 6, the respondent is sentenced to 4 years' imprisonment.

(g) On Charge 7, the respondent is sentenced to 3 years' imprisonment.

(h) On Charge 8, the respondent is sentenced to 4 years and 6 months' imprisonment.

(i) On Charge 9, the respondent is sentenced to 4 years' imprisonment.

(j) On Charge 10, the respondent is sentenced to 9 months' imprisonment.

(k) On Charge 11, the respondent is sentenced to 9 months' imprisonment.

PART A: Orders for cumulation

32 Charge 8 is the base sentence.

(a) On Charge 1, it is ordered that 6 months of the sentence imposed be served cumulatively on Charge 8 and each other sentence.

(b) On Charge 2, it is ordered that 6 months of the sentence imposed be served cumulatively on Charge 8 and each other sentence.

(c) On Charge 3, it is ordered that 3 months of the sentence imposed be served cumulatively on Charge 8 and each other sentence.

(d) On Charge 4, it is ordered that 6 months of the sentence imposed be served cumulatively on Charge 8 and each other sentence.

(e) On Charge 5, it is ordered that 2 months of the sentence imposed be served cumulatively on Charge 8 and each other sentence.

(f) On Charge 6, it is ordered that 6 months of the sentence imposed be served cumulatively on Charge 8 and each other sentence.

(g) On Charge 7, it is ordered that 4 months of the sentence imposed be served cumulatively on Charge 8 and each other sentence.

(h) On Charge 9, it is ordered that 6 months of the sentence imposed be served cumulatively on Charge 8 and each other sentence.

(i) On Charge 10, it is ordered that 2 months of the sentence imposed be served cumulatively on Charge 8 and each other sentence.

(j) On Charge 11, it is ordered that 1 month of the sentence imposed be served cumulatively on Charge 8 and each other sentence.

33 The total effective sentence will be 8 years' imprisonment with a minimum term before parole eligibility being 5 years and 8 months.

34 We have set out the effect of the above orders in table form in Annexure 1 to this judgment.

Section 6AAA statement

35 Pursuant to s 6AAA of the *Sentencing Act 1991*, but for the respondent's pleas of guilty, we would have sentenced him to an effective sentence of 9 years and 9 months' imprisonment with a minimum term to be served before parole eligibility of 6 years and 6 months.

Presentence detention declaration

36 Pursuant to s 18 of the *Sentencing Act 1991*, we declare that the respondent has served 502 days of imprisonment in presentence detention.

37

PART B: ANNEXURE 1

Charge on Indictment	Offence	Max Penalty	Sentence	Cumulation
1	OFAD (rolled-up charge)	10 years' imprisonment	4 years' imprisonment	6 months
2	OFAD (rolled-up charge)	10 years' imprisonment	4 years' imprisonment	6 months
3	OFAD (rolled-up charge)	10 years' imprisonment	18 months' imprisonment	3 months
4	OFAD (rolled-up charge)	10 years' imprisonment	4 years' imprisonment	6 months
5	OPD	10 years' imprisonment	12 months' imprisonment	2 months
6	OPD (rolled-up charge)	10 years' imprisonment	4 years' imprisonment	6 months
7	OFAD (rolled-up charge)	10 years' imprisonment	3 years' imprisonment	4 months
8	OFAD (rolled-up charge)	10 years' imprisonment	4 years 6 months' imprisonment	Base
9	OFAD (rolled-up charge)	10 years' imprisonment	4 years' imprisonment	6 months
10	OFAD (rolled-up charge)	10 years' imprisonment	9 months' imprisonment	2 months
11	OFAD	10 years' imprisonment	9 months' imprisonment	1 month
Total Effective Sentence:		8 years' imprisonment		
Non-Parole Period:		5 years and 8 months		
Pre-sentence Detention Declared:		502 days		
Section 6AAA		9 years and 9 months' imprisonment with a non-parole		

Statement:	period of 6 years and 6 months
Other Relevant Orders: Pursuant to s 86 *Sentencing Act 1991*, compensation order in the amount of $1,592,150.00.	